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ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	:	05 CV1217 (JS) (MLO)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES 1 – 10, Third Party Defendants.	:	

AUSTRALIAN GOLD'S THIRD PARTY COMPLAINT

Third-Party Plaintiff, Australian Gold, Inc. ("Australian Gold"), for its Third Party Complaint against Larry Sagarin ("Sagarin") and John Does 1 through 10, hereby states as follows:

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THE PARTIES

1. Australian Gold is an Indiana corporation with its principal place of business located at 6270 Corporate Drive, Indianapolis, Indiana.

2. Australian Gold is the manufacturer and exclusive distributor of Australian Gold®, Caribbean Gold® and Swedish Beauty® tanning lotions and other tanning related products ("Products"). Australian Gold's Products are considered premium tanning lotions in the indoor tanning industry and are sold to the majority of the over 25,000 tanning salons throughout the United States.

3. Australian Gold owns or is the licensee of registered and common law trademarks for the Australian Gold®, Swedish Beauty® and Caribbean Gold® brand names and the tanning lotions sold under those brands ("Marks"). A list of the federal registrations and applications for the Marks impermissibly used by S&L Vitamins is attached hereto as *Exhibit A*.

4. Australian Gold maintains internet websites at www.australiangold.com, www.swedishbeauty.com, and www.cgtan.com (collectively "Websites"). Australian Gold does not sell Products to the general public on the Websites. The Products are displayed on the Websites for informational purposes so that consumers interested may learn about the use and benefits of the Products. Consumers may then visit their local tanning salon where they will receive personal consultation and instruction and use on the appropriate Product for their skin type and tanning objectives.

5. Australian Gold owns the copyrights to all pictures, artwork and commentary of the Products displayed on the Websites.

6. Upon information and belief, S & L Vitamins does business on the internet at www.thesupplenet.com (and www.BodySourceOnline.com, which merely redirects web

browsers to www.thesupplenet.com) and at two (2) retail locations in and around Lindenhurst and Miller Place, New York under the name Body Source.

7. Among other things, S & L Vitamins sells Products on the internet and/or at its retail outlets causing damage to Australian Gold's distribution system and the reputation and goodwill of the Products and the company.

8. Upon information and belief, Sagarin is the owner of S&L Vitamins and has direct responsibility and oversight with respect to S&L Vitamins' purchase and sale of the Products on the internet and at its retail stores.

9. Upon information and belief S & L Vitamins, and/or its owners, own, operate, control, manage or represent at least one retail tanning salon. This tanning salon(s) is used as a vehicle in which to acquire Products and resell them over the internet.

10. Australian Gold is not aware of the true identities of the John Doe Third Party Defendants named in this action, but, upon information and belief, John Does 1 – 10 are agents, employees or other persons or entities who are acting in concert and participation with S & L Vitamins and Sagarin. Australian Gold will amend its claims to name the John Does as their identities are discovered in the course of this lawsuit.

JURISDICTION AND VENUE

11. This action includes claims for trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. §§1114, 1125(a), tortious interference with contract and prospective economic advantage, state law claims for trademark infringement, unfair and deceptive business practices and conspiracy. This Court has original jurisdiction based on federal question jurisdiction pursuant to 28 U.S.C. §1331 and diversity of citizenship pursuant to 28 U.S.C. §1332(a). The Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §1367.

12. Australian Gold is a citizen of the State of Indiana for purposes of diversity as it is incorporated in the State of Indiana and its principal place of business is in the State of Indiana. Sagarin is a resident of the State of New York. Further, the amount in controversy, exclusive of interest and costs, exceeds $75,000.

AUSTRALIAN GOLD'S DISTRIBUTION SYSTEM

13. Australian Gold distributes the Products through independent distributors for resale to tanning salons and hair care salons that offer on-premises tanning and instruction on the use of the Products. Sales to beauty supply stores, flea markets, internet sellers and other similar outlets are strictly prohibited. Distributors are prohibited from selling the Products to anyone outside of the distribution channel, including to those persons or entities that sell the Products on the internet.

14. Australian Gold implemented its current distribution strategy to (1) ensure that the end users of the Products received proper instruction and training on the use of the Products; (2) ensure the end user received face-to-face consultation with a trained salesperson so that the consumer purchased the correct Product based upon that person's skin type and tanning objectives; (3) ensure that the Products purchased and used by the consumer are used in a safe and proper manner since the Products are designed to achieve different results and not all Products are suited for all consumers; (4) protect the reputation and perception of the Products as premium products available only in tanning salons; and (5) allow for the opportunity to cross-sell other Products to the consumers, among other things.

15. Australian Gold has expended a substantial amount of time and effort to train its distributors and the tanning salons across the country, instructing them on the benefits of the Products and their intended use. On a yearly basis, it is not uncommon for Australian Gold to train over 20,000 individuals on the proper use and sale of the Products.

16. Australian Gold's current distribution system has increased and enhanced Australian Gold's sales and reputation in the marketplace. Australian Gold's sales have steadily increased over the years as it has streamlined its distributors and enforced its distribution system limiting sales to tanning salons.

17. To ensure that its distribution system is properly maintained, Australian Gold requires all of its authorized distributors to enter into agreements that specifically define to whom the Products may be sold.

18. Prior to January 1, 2005, Australian Gold distributed the Products through ETS, Inc., a separate company with common ownership. ETS entered into distributorship agreements with all of its distributors (hereafter "Distributorship Agreements"). Australian Gold now contracts directly with its distributors. A true and correct copy of the standard Distributorship Agreement (without exhibits) that all authorized distributors are required to sign is attached hereto as *Exhibit B*.

19. As of January 1, 2005, all rights and obligations in the Distributorship Agreements have been assigned by ETS to Australian Gold, who now acts as the manufacturer and distributor of the Products.

20. Specifically, the Distributorship Agreements provide that Distributors may market, distribute and sell Products only to legitimate tanning salons and hair care salons that offer indoor tanning as an on-premises service and instruction on the use of the Products. (Distributorship Agreement, Art. 1.1(D) and (E)). The Distributorship Agreements prohibit the sale of Products to a reseller, like the Defendant, who intends to re-sell the Products to the general public at large on the internet. (Distributorship Agreement, Art. 1.1(D) and (E)).

21. The Distributorship Agreements require all Distributors to assist Australian Gold "in educating Distributor's sales staff and Customers with regard to the use and benefit of the Products." (Distributorship Agreement, Art. 1.6). Distributors must also make their sales force available to Australian Gold for training and must conduct at least two (2) training sessions per year on the use and benefits of the Products to its customers. (Distributorship Agreement, Art. 1.6).

22. Australian Gold has expended substantial time and effort to preserve and protect the integrity of the distribution channels. Among other things, Australian Gold has (1) offered extensive training and instruction to each of its distributors and subdistributors and tanning salons regarding the proper channel of distribution of the Products; (2) held group and individual, meetings with distributors to discuss the Distributorship Agreements and the need to sell Products only within the authorized distribution channels; (3) communicated on a daily basis with its distributors to remind them of their obligations to sell the Products within the authorized distribution channel; and (4) pursued legal action against numerous individuals and entities to enforce the restrictions regarding the distribution of Products.

23. Among other things, Australian Gold has sent cease and desist letters to persons and entities selling the Products on the internet, terminated distributors found to have sold to internet businesses and filed lawsuits against internet businesses who have interfered with its distribution system and Distributorship Agreements.

24. As a direct result of these actions, the perceived value of the Products has remained high and sales have continued to increase. The Products' reputation has been enhanced as Products that are only available to consumers in legitimate tanning salons and not in discount outlets such as flea markets, beauty stores and the internet.

S&L VITAMINS' AND SAGARIN'S USE OF THE INTERNET TO ILLEGALLY SELL PRODUCTS

25. S & L Vitamins and Sagarin operate an internet website, www.thesupplenet.com, that sells the Products. They also control another domain name, www.BodySourceOnline.com, which automatically directs itself to the www.thesupplenet.com website.

26. S & L Vitamins and Sagarin also have a "brick and mortar" business known as Body Source, advertising on its website two retail locations located at 308 E Montauk Highway, Lindenhurst, NY 11757 and 159-6 Route 25A, Miller Place, NY 11764. Ironically, in its Complaint, S & L Vitamins alleged that "Body Source" at 308 E. Montauk Highway was "an unrelated entity," but the website states that www.thesupplenet.com is "brought to you by: Body Source 308 E Montauk Hwy Lindenhurst, N.Y. 11757." (See excerpt of www.thesupplenet.com webpage, attached hereto as *Exhibit C*).

27. S & L Vitamin's website is hosted by Yahoo! Store, an internet service operated by the internet company Yahoo!, that provides internet based businesses with services such as webpage hosting and sales orders processing.

28. As a result of its association with Yahoo! Store, S & L Vitamins has linked its internet business to Yahoo! and its search engine capabilities. Yahoo! allows businesses to "Sponsor" certain search terms on its search engine so that a business' website will be identified at or near the top of the search result. For example, a business may "pay for placement" with respect to the search term "digital cameras." Yahoo! lists "Sponsor Results" containing websites presumably related to "digital cameras." These websites pay to be a "sponsor" and to have their business identified at the top of the search result.

29. Yahoo! boasts that websites that "pay for placement" can reach 80% of internet users with search results listed on 8 of the top U.S. search engines, including Yahoo!, MSN, AltaVista, InfoSpace, AlltheWeb and NetZero.

30. Upon information and belief, S & L Vitamins and Sagarin have paid to use Australian Gold's intellectual property, including its Marks, on Yahoo! for the express purpose of directing internet traffic to www.thesupplenet.com.

31. S & L Vitamins' website is identified in the "Sponsor Results" on Yahoo! for the search term "Australian Gold." Its website is listed near the top of the webpage under "Sponsor Results." (See webpage from Yahoo! Shopping searching for "Australian Gold," attached hereto as *Exhibit D*).

32. S & L Vitamins' website also is identified in the "Sponsor Results" on Yahoo! for the search term "Swedish Beauty." Its website is again listed near the top of the webpage under "Sponsor Results." (See webpage from Yahoo! Shopping searching for "Swedish Beauty," attached hereto as *Exhibit E*).

33. S & L Vitamins and Sagarin are using Australian Gold's intellectual property on the www.thesupplenet.com and through Yahoo! to sell tanning lotions that directly compete with Australian Gold's Products.

34. At relevant times to this lawsuit, S & L Vitamins and Sagarin used Australian Gold's intellectual property, including its Marks, in the html source code, or metatags, on the website.

35. The use of Australian Gold's Marks was to benefit and profit from the goodwill associated with Australian Gold's business and its brand names.

36. At relevant times to this lawsuit, S & L Vitamins and Sagarin advertised and displayed the Products for sale on its website using Australian Gold's artwork and Product description. Each Product was sold on the website by displaying a photograph and a description of the Product.

37. At certain times relevant to this lawsuit, upon information and belief, the photographs of the Products and the descriptions were "cut and pasted" from Australian Gold's websites without permission from Australian Gold by S&L Vitamins, Sagarin, and/or one of their employees or agents. A true and correct sample of some of the photographs and descriptions misappropriated from Australian Gold's websites is attached hereto as *Exhibit F*.

38. To confuse and mislead others even further, S & L Vitamins and Sagarin changed how the website displayed the Products. S & L Vitamins currently displays their own photographs of the Products and falsely draws an association and affiliation between the Products, Australian Gold and S & L Vitamins. Each photograph of the Product has the text "BodySourceOnLine.com" and the "Body Source" name and logo superimposed over the photographs, giving the false impression that S & L Vitamins is either an authorized reseller of the Products or that it is affiliated with, sponsored or endorsed by Australian Gold. True and correct copies of sample pages from the website and the artwork are attached hereto as *Exhibit G*.

S&L VITAMINS' AND SAGARIN'S INTERFERENCE WITH AUSTRALIAN GOLD'S DISTRIBUTION SYSTEM

39. S & L Vitamins and Sagarin have obtained the Products and have resold them on the internet.

40. Upon information and belief, S & L Vitamins and Sagarin have obtained the Products, directly or indirectly, from one or more authorized distributors of the Products.

41. Upon information and belief, S & L Vitamins and Sagarin own, operate, control, represent or are affiliated with at least one currently unknown tanning salon to facilitate purchases of the Products from authorized distributors. The sole purpose of using a tanning salon as a pass through for these sales is to facilitate S & L Vitamins' and Sagarin's activities, avoid suspicion and to induce authorized distributors to sell Products to S&L Vitamins and Sagarin.

42. On or about January 15, 2004, Australian Gold (through its former distributor ETS) sent a cease and desist letter addressed to Body Source, which is one of the names under which S & L Vitamins does business, notifying it of its distribution system and the existence of the Distributorship Agreements. Australian Gold also provided S & L Vitamin's counsel with a copy of the Distributorship Agreement.

43. Despite having notice of the existence of the Distributorship Agreements and their prohibition on the sale of Products to non-tanning salons, S & L Vitamins and Sagarin have continued to purchase and sell the Products on the website and have refused to disclose their sources, including the name of the alleged tanning salon where they allegedly purchase the Products.

44. All conditions precedent have occurred, been performed, were waived or excused.

COUNT I – TRADEMARK INFRINGEMENT

45. Australian Gold incorporates by reference paragraphs one (1) through forty-four (44) as if fully set forth herein.

46. Australian Gold is the owner and/or licensee of certain registered and common law trademarks ("Marks") identifying its brand names and the Products. The Marks are identified in *Exhibit A*.

47. At relevant times to this lawsuit, S & L Vitamins and Sagarin have used the Marks, without authorization or permission, on the website, www.thesupplenet.com, in the website's metatags, and on Yahoo's pay for placement service to divert customers to their website.

48. S & L Vitamins and Sagarin have also manipulated photographs displaying Products on the website by superimposing its name, Body Source, and its website address over photographs of the Products, thereby impermissibly suggesting a sponsorship, affiliation, endorsement or association between Australian Gold and S & L Vitamins.

49. The conduct of S & L Vitamins and Sagarin is likely to cause confusion or mistake or to deceive as to the affiliation, connection or association of Australian Gold and S & L Vitamins or as to the origin, sponsorship or approval of the Products.

50. The conduct of S & L Vitamins and Sagarin was willful and intentional.

51. The conduct of S & L Vitamins and Sagarin constitutes trademark infringement for which S & L Vitamins and Sagarin are liable to Australian Gold for actual damages, profits, statutory damages and attorney fees.

COUNT II - TRADEMARK DILUTION

52. Australian Gold incorporates by reference paragraphs one (1) through fifty-one (51) as if fully set forth herein.

53. Australian Gold's Marks are distinctive and famous.

54. S & L Vitamins and Sagarin began using the Marks after they became famous.

55. The conduct of S & L Vitamins and Sagarin, as set forth herein, has caused dilution of the distinctive quality of Australian Gold's Marks and have diluted the value of the Marks.

56. S & L Vitamins and Sagarin intended to trade on the goodwill and reputation of Australian Gold by using the Marks in this manner.

57. The conduct of S & L Vitamins and Sagarin, as set forth herein, was willful and intentional.

58. S & L Vitamins and Sagarin have been and will continue to be unjustly enriched by their unlawful conduct and Australian Gold has suffered damages to its goodwill and reputation.

59. Australian Gold is entitled to its actual damages and statutory damages for the conduct of S & L Vitamins and Sagarin.

COUNT III - UNFAIR COMPETITION UNDER THE LANHAM ACT

60. Australian Gold incorporates by reference paragraphs one (1) through fifty-nine (59) as if fully set forth herein.

61. Through manipulation of the photographs on its website, S & L Vitamins and Sagarin have violated Section 43(a) of the Lanham Act by impermissibly suggesting a sponsorship, affiliation, endorsement or association between Australian Gold and S & L Vitamins, or as to the origin, sponsorship, or approval of the Products.

62. The conduct of S & L Vitamins and Sagarin was willful and intentional.

63. The conduct of S & L Vitamins and Sagarin is likely to cause confusion or mistake or to deceive as to the affiliation, connection or association of Australian Gold and S &

L Vitamins or as to the origin, sponsorship or approval of the Products and constitutes unfair competition under Section 43(a) of the Lanham Act, for which S & L Vitamins and Sagarin are liable to Australian Gold for actual damages, profits, statutory damages and attorney fees.

COUNT IV – TORTIOUS INTERFERENCE WITH CONTRACT

64. Australian Gold incorporates by reference paragraphs one (1) through sixty-three (63) as if fully set forth herein.

65. At all relevant times to this lawsuit, Australian Gold has valid and enforceable Distributorship Agreements with its authorized distributors and the restrictions contained therein.

66. S & L Vitamins and Sagarin are aware of Australian Gold's Distributorship Agreements with its authorized distributors.

67. Upon information and belief, S & L Vitamins and Sagarin have intentionally induced unknown authorized distributors to breach the Distributorship Agreements with Australian Gold by ordering the Products from these "John Doe" distributors and then selling the Products over the internet to the general public.

68. Upon information and belief, S & L Vitamins and Sagarin are using false pretenses to induce authorized distributors to sell them Products.

69. The conduct of S & L Vitamins and Sagarin is willful, malicious and unjustified and such interference is neither privileged nor excusable.

70. Australian Gold has been damaged by the conduct of S & L Vitamins and Sagarin.

COUNT I – TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

71. Australian Gold incorporates by reference paragraphs one (1) through seventy (70) as if fully set forth herein.

72. Australian Gold has enjoyed long and successful business relationships with its authorized distributors.

73. The conduct of S & L Vitamins and Sagarin has interfered with these relationships and constitutes tortious interference with Australian Gold's prospective business relationships with these distributors.

74. The conduct of S & L Vitamins and Sagarin was done by wrongful means and/or for the sole purpose of harming Australian Gold and its distribution system, for which S & L Vitamins and Sagarin, and any later identified person or entity who has acted in concert or participation with them, are liable to Australian Gold for actual and punitive damages in an amount to be proven at trial.

COUNT VI - UNFAIR COMPETITION AND DECEPTIVE BUSINESS PRACTICES

75. Australian Gold incorporates by reference paragraphs one (1) through seventy-four (74) as if fully set forth herein.

76. S & L Vitamins and Sagarin have engaged in a deceptive, consumer-oriented act and practice which is misleading in material respects and which has caused injury to Australian Gold and the general public.

77. Upon information and belief, S & L Vitamins and Sagarin have used Australian Gold's intellectual property, including its trademarks, on Yahoo! for the express purpose of diverting internet traffic to www.thesupplenet.com. S & L Vitamins and Sagarin are using Australian Gold's trademarks on its website and through Yahoo! to sell tanning lotions that directly compete with the Products.

78. To confuse and mislead the public, S & L Vitamins and Sagarin currently display the Products with the text "BodySourceOnLine.com" and the "BodySource" name and logo superimposed over photographs of the Products, giving the false and misleading impression that

S & L Vitamins is either an authorized seller of the Products or that it is affiliated with, sponsored or endorsed by Australian Gold.

79. Australian Gold has been injured as the result of S & L Vitamins' and Sagarin's deceptive acts.

80. The conduct of S & L Vitamins and Sagarin was willful and intentional.

81. The conduct of S & L Vitamins and Sagarin, as set forth above, constitutes violations of the New York Deceptive Trade Practices Act. *N.Y. Gen. Bus. Law* § 349 (McKinney 2005).

82. The conduct of S & L Vitamins and Sagarin, as set forth above, violates *N.Y. Gen. Bus. Law* § 133 (McKinney 2005) as they have intentionally used Australian Gold's names with the intent to deceive and mislead the public.

83. Australian Gold seeks its actual damages, treble damages, injunctive relief and attorney fees.

COUNT VII - STATE LAW TRADEMARK INFRINGEMENT

84. Australian Gold incorporates by reference paragraphs one (1) through eighty-three (83) as if fully set forth herein.

85. The conduct of S & L Vitamins and Sagarin is likely to cause confusion or mistake or to deceive as to the affiliation, connection or association of Australian Gold and S & L Vitamins or as to the origin, sponsorship or approval of the Products.

86. The conduct of S & L Vitamins and Sagarin, as set forth above, constitutes trademark infringement under state law for which S & L Vitamins and Sagarin are liable to Australian Gold for its actual damages and injunctive relief.

COUNT VIII - FALSE ADVERTISING

87. Plaintiffs incorporate by reference paragraphs one (1) through eighty-six (86) as if fully set forth herein.

88. S&L Vitamins' and Sagarin's advertisement of the Products on the website is misleading in material respects and has caused injury to Australian Gold and the general public.

89. The conduct of S & L Vitamins and Sagarin, as set forth above, constitutes false advertising under the Lanham Act, 15 U.S.C. § 1125(a) and state law, *N.Y. Gen. Bus. Law*, § 350 (McKinney 2005).

COUNT IX - INJUNCTIVE RELIEF

90. Plaintiffs incorporate by reference paragraphs one (1) through eighty-nine (89) as if fully set forth herein.

91. S & L Vitamins' conduct has caused Australian Gold irreparable harm.

92. The Products are marketed as premium, exclusive products available only in tanning salons and hair care salons that offer on-premises tanning. S & L Vitamins and Sagarin have jeopardized and undermined Australian Gold' distribution system by selling these Products over the internet and interfering with Australian Gold's distribution system. Monetary damages alone are insufficient to compensate Australian Gold. Injunctive relief is necessary to ensure that Australian Gold's distribution channels and its intellectual property are preserved.

93. Australian Gold requests that S & L Vitamins and Sagarin be enjoined from interfering with any Distributorship Agreement, including the purchase and sale of Products, and from otherwise interfering with Australian Gold's distribution channel and its contractual and business relationships.

94. Australian Gold requests that S & L Vitamins and Sagarin be enjoined from infringing on any of Australian Gold's Marks, including bidding on any Mark on any pay for

placement service, using any Mark in the metatag or html source code, or using any Mark in any manner that is likely to cause confusion or mistake as to the affiliation, connection or association of Australian Gold and S & L Vitamins or as to the origin, sponsorship or approval of the Products. 15 U.S.C. §1116(a); *N.Y. Gen. Bus. Law* §360-1 (McKinney 2005).

COUNT X - CONSPIRACY AND CONCERT OF ACTION

95. Australian Gold incorporates by reference paragraphs one (1) through ninety-four (94) as if fully set forth herein.

96. Upon information and belief, S & L Vitamins and Sagarin have conspired with unknown distributors and other persons to illegally obtain the Products and sell them on the internet.

97. The conduct of S & L Vitamins and Sagarin with unknown third parties constitutes conspiracy and concert of action to tortiously interfere with the Distributorship Agreements and Australian Gold's business relationships, for which each conspirator is liable to Australian Gold for damages.

WHEREFORE, Australian Gold, Inc., by counsel, respectfully requests the Court to:

A Enter judgment in its favor and against Sagarin on all claims and award Australian Gold actual damages in an amount to be proven at trial;

B Award Australian Gold punitive damages for Sagarin's tortious interference with the Distributorship Agreements and prospective economic advantage;

C Award Australian Gold profits and treble damages for Sagarin's infringement of the Marks pursuant to 15 U.S.C. §1117(a);

D Award Australian Gold actual and treble damages on its claim for unfair competition and deceptive business practices under state law;

E Permanently enjoin Sagarin, and any other person or entity acting in concert or participation with any of them, from interfering with any Distributorship Agreement, including the purchase and sale of Products, and from otherwise interfering with Australian Gold's distribution channel and its contractual and business relationships;

F Permanently enjoin Sagarin, and any other person or entity acting in concert or participation with any of them, from infringing on any of Australian Gold's Marks, including bidding on any Mark on any pay for placement service, using any Mark in the metatag or html source code, or using any Mark in any manner that is likely to cause confusion or mistake as to the affiliation, connection or association of Australian Gold and S & L Vitamins or as to the origin, sponsorship or approval of the Products;

G Award Australian Gold pre-judgment interest, costs, attorney fees; and

H Award all other appropriate relief.

Dated: May 24, 2005
New York, New York

Respectfully submitted,

MINTZ LEVIN COHEN FERRIS GLOVSKY
AND POPEO, P.C.

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